No. 169. October Term.

# In the Supreme Court of the United States

October Term, 1913.

THE NEW YORK CENTRAL RAILROAD COMPANY

v.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1923.

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No. 169. CERTIFICATE.

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THE NEW YORK CENTRAL RAILROAD COMPANY

*v.*

UNITED STATES OF AMERICA.

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**ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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## BRIEF FOR THE UNITED STATES.

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## I.

### STATEMENT.

The company assembled a locomotive and 63 cars in a train at Coalburg, Ohio, a station on its line, which departed on Nov. 10, 1920, at 8.20 p. m., and moved *via* Erie, Pa., to Buffalo, where it arrived on Nov. 11, 1920, at 9.40 p. m.

All air brakes and air-brake appliances on all cars were inspected and tested and were in proper working order and could be and were used and operated by the engineer when the train departed from Coalburg.

After leaving Coalburg the air brakes on cars I. C. 94320, P. R. R. 324220, and B. & O. 221591, being the 10th, 40th, and 44th, respectively, counting from the engine, became out of order from unknown causes and could not be effectively used and operated. Because of the liability of the brakes to stick and cause delay and damage to the train the trainmen cut them out from their connection with the line of air hose extending from the locomotive to the end of the train by turning the cut-out cocks in the crossover pipes. This made it impossible for the engineer to use or operate the brakes on the three cars to control the speed of the train, but it did not interfere with his use or operation of the brakes on the 60 other cars, which he did use and operate independently of the brakes on the three cars, and thereby controlled the speed of the train without requiring brakemen to use the common hand brakes for that purpose.

Upon arrival at Erie the train had its locomotive and caboose removed and another locomotive and caboose attached, and left Erie at 12.10 p. m. on November 11, 1920, in the condition stated. In that condition the train proceeded to Buffalo, passing through Erie, where the company had repair men and materials available for the repair of the defective brakes.

With respect to another train of 80 cars, the findings of fact were identical with the foregoing except as to point of origin, numbers, and initials of cars.

Under the Safety Appliance acts of March 2, 1893 (27 Stat. 531), as amended by the act of March 2, 1903 (32 Stat. 943), and the Order of the Interstate Commerce Commission of June 6, 1910, entered in pursuance of those acts, the Government brought an action to recover the penalties prescribed because the company operated two freight trains, one consisting of 63 cars and the other of 80 cars, all being equipped with power or train brakes, when three cars in each train, because their power brakes became out of order, did not have their power or train brakes used and operated by the engineer of the locomotive drawing the train, although they were coupled with the other 60 and 77 cars, respectively, and were cars equipped with power brakes.

The parties stipulated the facts and waived a jury. The District Court entered judgment against the company for the penalties. On its appeal to the Circuit Court of Appeals, the latter certified the following question to this court, viz:

> May an interstate carrier lawfully operate a car equipped with power brakes past an available repair station to destination when its power brakes, becoming out of order in transit, have been cut out of the power-brake system of the train and when more than eighty-five per centum of the remaining cars of the train are equipped with power brakes controlled by the engineer of the locomotive?

## II.

### THE SAFETY APPLIANCE ACTS.

The Safety Appliance act approved March 2, 1893, provides (27 Stat. 531): (Italics ours.)

> SEC. 1. * * * it shall be unlawful for any common carrier * * * to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
>
> SEC. 2. * * * it shall be unlawful for any common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
>
> SEC. 4. * * * until otherwise ordered by the * * * Commission, it shall be unlawful for any railroad company to use *any* car in interstate commerce that is not provided with secure grab irons * * *.
>
> SEC. 5. * * * *no* cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above

provided for (height of drawbars for freight cars).

SEC. 6. (As amended April 1, 1896, 29 Stat. 85.) That *any* such common carrier using *any* locomotive engine, running *any* train, or hauling or permitting to be hauled or used on its line *any* car in violation of *any* of the provisions of this act shall be liable to a penalty * * *.

The Safety Appliance Act of March 2, 1903, provides (32 Stat. 943):

SEC. 1. That the provisions and requirements of the act entitled "An act to promote the Safety of Employes and Travelers" * * * approved March 2, 1893, amended April 1, 1896, shall be held to apply to common carriers by railroads * * * and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles * * *.

SEC. 2. That whenever, as provided in said act, *any* train is operated with power or train brakes, not less than fifty [1] per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive

[1] On June 6, 1910, the Commission ordered that not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.

drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the * * * Commission may from time to time after full hearing increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid, and failure to comply with *any* such requirement of said * * * Commission shall be subject to the like penalty as failure to comply with *any* requirement of this section.

The Safety Appliance act of April 14, 1910, provides (36 Stat. 298): (Italics ours).

SEC. 1. * * * That the provisions of this act shall apply to *every* common carrier and *every* vehicle subject to * * * the "Safety Appliance acts".

SEC. 2. * * * it shall be unlawful for *any* common carrier * * * to haul or permit to be hauled or used on its line *any* car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: *All* cars must be equipped with secure sill steps and efficient hand brakes; *all* cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and *all* cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: provided, that in

the loading and hauling of long commodities requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. * * * Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section 2 of this act and section 4 of the act of March 2, 1893, and shall give notice of such designation to all common carriers, * * * and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on *all* cars subject to the provisions of this act * * *.

SEC. 4. That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line *any* car subject to the requirements of this act not equipped as provided in this act shall be liable to a penalty * * * provided, that where *any* car shall have been properly equipped as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier, * * * such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability for the penalty * * *.

The Safety Appliance acts freely apply the words *any* and *all*. Thus, section 1 of the original act makes it unlawful for any common carrier to use on

its line "*any* locomotive engine," or to run "*any* train" that has not a sufficient number of cars in it so equipped with power brakes or train brakes that the engineer can control *its* speed. That section deals with locomotives and trains. As Judge Grosscup said, "the car not being the unit, but the train of which the car is a constituent." Section 2 makes it unlawful to haul or use "*any* car" not equipped with automatic couplers. Section 4 makes it unlawful to use "*any* car" that is not provided with grab irons or handholds. Section 5 provides for the determination of the standard height of drawbars and that "*no* cars" shall be used which do not comply with the standard. Section 6 provides the penalty for "*any* such common carrier using *any* locomotive engine, running *any* train or hauling or permitting to be hauled or used on its line *any* car in violation of *any* of the provisions of this act."

In the Safety Appliance act of March 2, 1903, the previous acts were made to apply "in *all* cases whether or not the couplers brought together are of the same kind, make, or type and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars are made to apply to *all* trains, locomotives, tenders, cars, and similar vehicles." Section 2, out of which the instant case grows, is all-comprehensive; thus: "That *whenever* * * * *any* train is operated with power or train brakes, not less than fifty (eighty-five) per centum of the cars in such train shall have their

brakes used and operated by the engineer of the locomotive drawing such train; and *all* power-braked cars in such train which are associated together with said fifty (eighty-five) per centum shall have their brakes *so* used and operated."

The Safety Appliance act of April 14, 1910, is equally so, in using the words "*any* common carrier," "*any* car," "*all* cars must be equipped," "*all* cars requiring secure ladders," and "*all* cars having ladders." Section 3 refers to "*all* cars subject to the provisions of this act," and "*any* car or vehicle." Section 4 prescribes the penalty for using or hauling "*any* car * * * not equipped as provided in this act." Section 4 further provides: (36 Stat. 299).

> That where any car shall have been properly equipped, * * * and such equipment shall have become defective or insecure while such car was being used by such carrier * * *, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability * * *, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; * * * and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight.

The use of the word *association* indicates a distinction between the hauling of defective cars by means of chains instead of drawbars "in revenue trains *or* in association with other cars." Such use of the word clearly reaches back to section 2 of the previous act and relates to "all power-brake cars in such train which are associated together." It is obvious that in the act of April 14, 1910, the Congress distinguished between defective cars in revenue trains and defective cars associated together with other cars. Here was a direct reference in the later act to the "power-braked cars in such train which are associated together," referred to in the previous act. Without a working drawbar a power-braked car might require the use of chains to move it to the nearest available point for repair as any other car; therefore, the words "and all power-braked cars in such train which are associated together" were referred to specifically.

## III.

**IN ORDER TO EFFECTUATE THE INTENT OF THE LAW-MAKING POWER, THE SAFETY APPLIANCE ACTS SHOULD BE BROADLY EXPOUNDED.**

*Southern Railway* v. *United States*, 222 U. S. 20, 27, Mr. Justice Van Devanter: (italics ours.)

> * * * the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil

> the safety of other trains. *And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others.*

*Johnson* v. *Southern Pacific*, 196 U. S. 1, 17, Mr. Chief Justice Fuller:

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1, 12, and cases cited. And see *Farmers' and Merchants' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Gray* v. *Bennett*, 3 Met. (Mass.) 522.

*Chicago, M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. Rep. 522, 527, Circuit Judge Van Devanter:

> * * * Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. Science had offered, and practical use

> had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling. The two statutes, federal and state, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief, and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of anyone going between, or at least entirely between, the cars.

*Southern Ry. Co.* v. *Snyder*, 187 Fed. Rep. 492, 497, Circuit Judge Knappen:

> * * * Assuming that the car was generally subject to the safety appliance act, it is clear that it was defendant's duty to exercise a high degree of diligence in discovering and repairing the defect in the coupler, and in withdrawing the car from commercial use while such defect existed. * * *

*Wabash Railway* v. *United States*, 168 Fed. Rep. 1, 9, Circuit Judge Grosscup:

> * * * Primarily, these safety-appliance acts are to safeguard railway employees—the car not being the unit, but the train of which the car is a constituent—and in carrying out this primary object the necessity of regulation extends to every car to be operated, not only those to be operated from state to state but those to be operated wholly within a given state. * * *

*Atlantic Coast Line* v. *United States*, 168 Fed. Rep. 175, 186, 187, Circuit Judge Pritchard:

> * * * It was the manifest intention of Congress, in the enactment of this statute, to require all common carriers engaged in interstate commerce to keep their cars and engines at all times equipped with proper safety appliances. *The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional.* Therefore *any* failure on the part of a railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed. * * *

## IV.

### THE QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS SHOULD BE ANSWERED IN THE NEGATIVE.

The weight of authority and the recent cases are against the position of the Company.

The Interstate Commerce Commission, the body "appointed by law and informed by experience," has always placed a construction on the law which requires a negative answer to the question.

In *Re power or train brakes*, 11 I. C. C. 429, 435–436, on November 15, 1905, the Commission increased the minimum percentage from 50 per cent to 75 per cent, and said:

> In this connection it is contended that when all cars are equipped with air brakes it will be unnecessary for the commission to make any order establishing a definite minimum

percentage of cars which must have their brakes used and operated, for the reason that the law itself requires that "all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated," and with trains composed of all air-braked cars the association of such cars together must be complete, necessitating their full use and operation by the terms of the law. An equipped car having a defective brake forms no bar to the operation of all other equipped cars in the train which may be associated together, for the reason that the defective car may be simply cut out, causing no break in the continuity of the train line. It is the unequipped car associated with the equipped cars, thus causing a break in the continuity of the train line, that causes the difficulty of associating a larger number of air-braked cars together in trains, except by extra switching, thus adding to the difficulties of handling traffic expeditiously and aggravating the congestion in yards. When all cars are equipped these difficulties will disappear.

It is the opinion of the commission that all cars should be equipped with air brakes and that all brakes should be used and operated; and this is unmistakably the intent of the law. This is a condition that is required in the interests of safety, both to employees and the traveling public. It will also facilitate the movement of traffic and permit of its being handled with greater economy, as is evidenced by the testimony in behalf of the railroads.

In its annual report to Congress for the fiscal year ending June 30, 1908, in referring to its order of November 15, 1905, increasing the minimum percentage, the Commission again said (p. 43):

> By an order of the commission, effective August 1, 1906, the minimum percentage of power-braked cars to be used in trains was increased to 75 per cent, and it was further ordered that "all power-braked cars in every such train which are associated together with said 75 per centum shall have their brakes so used and operated." As a result of the requirement of the Master Car Builders' Association that all cars offered in interchange shall be equipped with air brakes, practically all cars are now so equipped. It necessarily follows, therefore, that all such brakes must be in operative condition in order that the law may be complied with. The importance of maintaining all brakes in operative condition is thus clearly apparent; that this has not been done may be due to misapprehension by railway officials concerning the actual requirements of the law.[1]

In its annual report to Congress for the fiscal year ending June 30, 1909, on the question of further increasing the minimum percentage (see order of June 6, 1910, *ante*, 5), the Commission further said (p. 42):

> On May 5, 1909, the commission held a hearing on the question of increasing the mini-

[1] See also annual reports Chief Bureau of Safety to Commission, 1918, 1919, 1920; report and opinion of Commission in re investigation of accident on N. Y., N. H. & H. R. R., Sept. 22, 1913; same in re investigation of accident on A., T. & S. F. Ry., Monrovia, Cal., Apr. 4, 1915.

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mum percentage of power brakes to be used in trains. This hearing developed that approximately 97.5 per cent of the freight cars owned by the railroads of the country were then equipped with air brakes, and that equipment was proceeding at such a rate as to make it practically certain that all freight cars in ordinary service would soon be equipped with power brakes. In view of these conditions, the commission has not as yet taken further action looking to an increase in the minimum percentage of brakes to be used in trains, for the reason that Section 2 of the amended safety appliance law distinctly requires that all power-braked cars which are associated together with the minimum required by the law shall have their brakes used and operated. This can only be construed to mean that when trains are composed entirely of power-braked cars all cars in such trains must have their brakes used and operated; in short, it means 100 per cent of brakes to be used and operated on every train having all its cars equipped with power brakes. The law provides that the commission may increase the minimum percentage of cars required to be operated with power brakes from time to time, but grants the commission no authority with respect to the further provision that "all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated." It is therefore evident that the commission has no power to make an order permitting the operation of any percentage of brakes less than 100 per cent on trains that are 100 per

cent equipped, as the effect of such an order would be to decrease the percentage required by law, and the commission's power extends only to the matter of increasing such percentage.

Previous to the date of the hearing above referred to a general misunderstanding seems to have prevailed concerning that portion of the law which requires that all power-braked cars associated together with the minimum shall have their brakes used and operated, the belief evidently being that if 75 per cent of the cars in a train had their brakes in condition to be used and operated the law was complied with. This erroneous view led to the interchange of cars between various roads which a reasonable inspection would have shown to have their brakes in such a defective condition as to render them inefficient and unsafe for use on heavy grades. Since the hearing above noted, and the terminal tests which have been conducted by our inspectors, a different view has become prevalent, and now in many cases cars with defective brakes are being treated at interchange points the same as cars having other safety appliance defects. This can not fail to produce results which will enable the railroads to obtain the maximum efficiency from the brakes which they have been at such great expense to install.

The American Railway Association recommends that all cars on freight trains shall be equipped with power brakes, and the rules of the Master Car Builders' Association now require that all cars offered in interchange must be equipped with air brakes. As the result,

> practically all freight cars in the country are now provided with power-brake equipment, and it only remains to see that this equipment is maintained in efficient working order, and not permitted to pass from one road to another in defective condition, to secure the maximum good results from the equipment.

In *Heath* v. *Wallace*, 138 U. S. 573, 582, Mr. Justice Lamar, speaking for this Court, said:

> Moreover, if the question be considered in a somewhat different light, viz, as the contemporaneous construction of a statute by those officers of the Government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. For, as said in *United States* v. *Moore*, 95 U. S. 760, 763, "the officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." See *Hastings, etc., Railroad Co.* v. *Whitney*, 132 U. S. 357, 366, and cases there cited; *Schell* v. *Fauche*, *ante*, 562.

In *Pennell* v. *Philadelphia & Reading*, 231 U. S. 675, 680, Mr. Justice McKenna, speaking for this Court, said:

> And the construction of the statute is the main concern. If it is not mandatory, as we

think it is not, of an automatic coupler between the engine and the tender, the contentions of plaintiff are without foundation. We need not refer to them with further detail except to say that the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute.

In *United States* v. *Great Northern Railway*, decided May 8, 1922 (unreported), and referred to by opposing counsel (Br. 19), District Judge Bourquin said:

> Defendant is charged with 16 violations of the safety appliance act. Its only defense is to one of them, in respect to which it is agreed that defendant operated an interstate train of 35 cars equipped with power brakes in working order, all and sufficient to control train speed used, save one, the twenty-ninth, which, for some unexplained reason, had turned off the air cock between train line and brake apparatus.
>
> The statutes (Comp. St., sec. 8605, 8614), amplified by the Commerce Commission's order, are that no such train shall be operated without a minimum of 85 per cent operated power-brake cars and sufficient to control train speed, "and all power-braked cars in such train which are associated together with said 85 per cent shall have their brakes so used and operated."
>
> That is to say, if 85 per cent and sufficient cars are operated power braked, the other 15 per cent may be hand braked, power

braked, or without brakes, for that matter, separately or intermingled, subject to one condition, viz, all excess power-braked cars which are "associated together with said 85 per cent shall have their brakes so used and operated."

In the circumstances, elementary rules of construction attach consequence to and interpret "associated together with said 85 per cent" as meaning intimately, immediately, directly attached, connected, joined to the 85 per cent, in which position alone it is possible for any excess power-brake cars to "have their brakes so used and operated." It is position and not condition or common use of air actually made that determines whether or not the excess cars are "associated together with" the 85 per cent.

Otherwise, if excess power-braked cars can be directly joined to the 85 per cent but the air cut off as in the instant case and the statute not violated, it converts the statute's command into an option—into an obviously senseless direction to "use the power brakes on the excess cars if you use them."

On the other hand, to construe the statute to apply to power-braked cars in the train but not "associated together with said 85 per cent," as aforesaid, is to deny meaning to this term, and is an unwarranted extension of the letter of the penal part of the statute to serve the spirit of its remedial part.

It is clear Congress perceived that for a long time (there?) would be necessary use of some hand-brake cars. They must, however,

be located in the rear of the 85 per cent, the latter necessarily a solid block next the engine. Congress also knew that in making up trains excess power-brake cars might be where they could not be power braked, dissociated, separated from the 85 per cent by hand-braked cars. Reasonable safety being assured by the 85 per cent, the carrier is not bound to expend time and labor to switch out these excess power-brake cars and associate them with, join them to, the 85 per cent; but, if it so falls out that they are where they can be power braked, that is, associated with, joined to the 85 per cent, their power brakes must be so operated to afford an extra margin of safety, to lessen the number of cars that it may be necessary to hand brake (the very object of the statute as a whole), for purposes other than to control train speed, perhaps obviating necessity to hand brake any, and to avoid hazard of unoperated power-braked cars being accidentally enumerated in the block to make up the required 85 per cent. These are valid reasons doubtless suggested to Congress why the statute makes distinction between hand-brake cars and power-brake cars with air cut off.

Furthermore, what reason moved Congress is not necessarily of concern to the courts, since within its powers it has so legislated.

If, so far as courts can discern, this provision of the statute is only an arbitrary exercise of admitted power, it prevails.

Whether or not disabled excess power-braked cars associated together with the 85

per cent are a violation of the statute may depend on the nature of the disablement. It may be so great as to exclude them from the category of "power-braked" cars. However, the question is not here involved. Without comment, reference is made to *U. S.* v. *Ry. Co.*, 247 Fed. 49.

Defendant violated the statute.

In *United States* v. *Clinchfield, etc., Railway*, decided April 22, 1921 (unreported), and referred to by opposing counsel (Br. 14), District Judge Sanford said:

> As a matter of the weight of authority, it appears that the judges of the courts by whom the question has been determined are about evenly divided in opinion. On the whole I am inclined to think that the view expressed by Judge Knapp in his dissenting opinion in the *Chesapeake Railway case* is based upon the sounder reasoning, being not only in accordance with the letter of the act and the construction given it by the Interstate Commerce Commission, the administrative body charged with its enforcement, but also giving substantial meaning to the clause providing that "all power-braked cars in such train which are associated together with said * * * per centum shall have their brakes (so) used and operated," which, upon the defendant's theory of construction, is practically superfluous. It is furthermore to be noted that in the *Baltimore Railroad* and *Chesapeake Railway cases* the position in the train of the power-braked cars which were not connected up with the

engine does not appear, and they may well have been at the rear of the train and separated from the required number of power-braked cars directly connected with the engine. It appears in the present case, however, that the power-braked cars which were not connected up with the engine were scattered at intervals through the series of power-braked cars which were so connected, being, as agreed, the second, tenth, and twenty-eighth cars, respectively, in the train of 59 cars. The act, however, provides by its terms that "all power-braked cars in such train which are associated together with 'the minimum per centum' shall have their brakes so used and operated." This apparently does not require all power-braked cars in the train to have their brakes so used and operated—otherwise the words "which are associated together with" would be entirely meaningless—but draws a distinction between such additional power-braked cars in the train as are "associated together with" the required per centum, and those which are not so associated. Without determining what would be the result if these three power-braked cars had been attached at the rear of the train, out of direct association with the required per centum of cars, and where they could be conveniently handled by a brakeman with the hand brakes, I am of the opinion that as they were scattered at intervals through the train in the midst of the power-braked cars connected with the engine, making the use of the hand brakes on such cars difficult if not impracticable, they

> must be deemed to have been "associated together with" the 85 per centum of power-braked cars within the meaning of the act, and that hence, not having had their brakes used and operated by the engineer on the locomotive, there was a violation of the act rendering the railroad company liable for the penalty imposed.

In *United States* v. *Chesapeake & Ohio*, 247 Fed. Rep. 49, it is true that Circuit Judge Pritchard and District Judge Dayton concurred in an opinion which, if followed, would require an affirmative answer to the question; however, the dissenting opinion of Judge Knapp, who was chairman of the Commission for many years and whose wide observation and experience peculiarly qualified him to express sound views, is not unworthy of extended examination, as it is a vigourous statement in support of the Government's position. Judge Knapp said (p. 52):

> I can not concur in holding it lawful to haul a car which has been equipped with power brakes, when such brakes are unused and unusable, because not in good order. Such a construction of the law seems to me unwarranted by its terms and clearly opposed to its spirit and purpose. It is a matter of common knowledge that the power-brake requirement has not been extended to all cars, because a considerable number of them, too good and too much needed to be withdrawn from service, can not be equipped without prohibitive expense. The initial act of 1893 required a

"sufficient number" of power-braked cars to enable the engineer to control a train without the use of hand brakes. In 1896 a minimum of 50 per cent was imposed, and this minimum has been increased by the commission, under grant of authority, first, in 1906 to 75 per cent, and later, in 1910 to 85 per cent. But nowhere in the language or legislative history of these enactments and orders do I find any indication of an intent to allow the commercial movement of cars provided with power brakes, when such brakes are not used because out of order or for other reasons. Every reasonable inference appears to me to the contrary. The hauling in each train of a certain percentage, reduced gradually from 50 to 15, of cars not so equipped and used has been permitted, not to cover power-braked cars whose brakes are defective and unworkable but to keep in needed use a class of cars that can not as a practical matter be provided with the power-brake appliance. In other words, the percentage exemption includes, in my judgment, and was intended to include, only the older type of hand-braked cars which for one cause and another are not convertible into power-braked cars, but which in the public interest ought not to be taken out of service.

A car equipped with power brakes, whether originally or by alteration, is in the class of power-braked cars to which the statute applies, and I can not believe that such a car ceases to belong to that class when and because its power brakes are out of order. Surely

the defective condition of its power brakes does not make it in any sense a hand-braked car, and why then should that condition entitle it to claim exemption? To hold that it does is, as seems to me, to limit unduly and beyond the legislative intent the aim and scope of the safety appliance laws, and particularly the train-brake provisions in section 2 of the 1903 enactment, which says:

"That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty (now eighty-five) per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty (now eighty-five) per centum shall have their brakes so used and operated."

This means, in my judgment, not merely that 85 per cent at least of the cars in any train must have power brakes "used and operated," but that all power-braked cars in a given train, however many there may be, must be associated together and used by the engineer, and this necessarily implies that all of them must have their power brakes in an operable condition. So the commission held in its annual report to the Congress in 1908 (page 43), saying:

"As a result of the requirement of the Master Car Builders' Association that all cars offered in interchange shall be equipped with power brakes, practically all cars are now so equipped.

It necessarily follows, therefore, that all such brakes must be in operative condition in order that the law may be complied with. The importance of maintaining all brakes in operative condition is thus clearly apparent; that this has not been done may be due to misapprehension by railway officials concerning the actual requirements of the law."

It is familiar doctrine that the construction given to a statute by those charged with the duty of executing it is entitled to great respect and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 206, 6 L. Ed. 603; *United States* v. *Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Brown* v. *United States*, 113 U. S. 568, 571, 5 Sup. Ct. 648, 28 L. Ed. 1079; *Heath* v. *Wallace*, 138 U. S. 582, 11 Sup. Ct. 380, 34 L. Ed. 1063; *Delano* v. *United States*, 220 Fed. 635, 136 C. C. A. 243.

The construction put upon this law by the commission, which I believe to be correct, seems fully supported by two recent decisions of the Sixth Circuit Court of Appeals, *Pennsylvania Co.* v. *United States*, 241 Fed. 824, 154 C. C. A. 526, and *B. & O. S. W. Ry. Co.* v. *United States*, 242 Fed. 420, C. C. A., and by numerous cases therein cited I am of opinion that the commercial hauling of cars equipped with power brakes, when such brakes are out of order and unused, is a violation of the safety appliance acts, and I must therefore vote to reverse the judgment.

In *Lyon* v. *C. & W. C. Ry. Co.*, 77 S. Car. Rep., 328, 339, 56 S. E. Rep., 18, 22, the Supreme Court of South Carolina[1] said:

> The statute does not require all cars which may be equipped with power brakes to be coupled or associated together, but only 50 per cent of such cars, but it does require all that may have been equipped with power brakes and actually associated with 50 per cent to be controlled by the engineer from the locomotive. The statute contemplates and allows that there may be cars in the train equipped with air brakes and not associated with the 50 per cent operated from the engine. The word "associated," as here used, manifestly means the cars immediately connected with the 50 per cent equipped with power brakes and operated from the engine; and those associated cars are also required to be operated from the engine. But the terms of the statute not only fail to require all cars of the train to be equipped with air brakes operated from the engine but impliedly excludes such requirement by expressing the requirement that such cars when associated with the minimum number of cars shall be so equipped.

District Judge Thomson, on February 25, 1922, in deciding the instant case adversely to the defendant Company, said:

> Second. In addition to the requirement of 85 per cent of power-braked cars, there is in

[1] Associate Justice Charles A. Woods, who wrote the opinion, is now United States Circuit Judge for the fourth judicial circuit.

the act a requirement of equal force, that "all power-braked cars in such train which are associated together with said fifty (now 85) per centum, shall have their brakes so used and operated."

Third. There are only two classes of cars referred to in the act, namely, power or train-braked cars and hand-braked cars. The distinction between these two classes is very clear and relates to the method by which the brake system is constructed and operated in the two classes; and the fact that the brake of a power car may be temporarily inoperative does not remove the car from the class of power-braked cars.

Fourth. The minimum percentage was prescribed, doubtless, because there were many cars in service which had not been equipped with power brakes, and the minimum provision was made that these cars might be continued in service until they were equipped with power brakes.

Thus the act and its amendments, and the acts of the Interstate Commerce Commission, clearly contemplate a progressive advance from the hand-brake system until all cars shall be power braked.

Fifth. The provision that "all power-braked cars in said train which are associated together with said fifty (now 85) per centum shall have their brakes so used and operated;" which may be termed the maximum provision, is equally obligatory as is the minimum provision of 85 per cent. If not less than 85 per cent of the cars were being operated by

power brakes, and following these were certain hand-braked cars, and these again were followed by power-braked cars, these last need not be operated, as they are not associated with the 85 per cent within the clear meaning of the act of Congress. But with the maximum provision requiring the brakes on all power-braked cars associated with the 85 per cent to be used and operated, it must be reasonably clear that if all the cars in the train are power-braked cars they must all be so used and operated.

If this is the correct interpretation of the law, it is no sufficient answer to say that the speed of the train can be controlled by the engineer when power-braked cars, whose brakes are temporarily inoperative, are interspersed between other operative power-braked cars, as such cars can be cut out from the line of air hose without interference with the power brake system of operation. While such a method of controlling the speed of the train may be operative, it by no means follows that it is equally safe and efficient as if all the cars associated together were operated by train brakes under the control of the engineer. If one car may be cut out, what limit can be set upon the number that may be thus cut out? It is perfectly apparent that if a considerable number of cars in succession were cut off from the train-brake system, the jolt and jar of these uncontrolled cars would seriously interfere with the efficient control of the train; and the point would soon be reached when such efficiency and control

would be lost. Every reason which efficiency in operation and safety to the employees and travelers can suggest must be assumed to have been in the mind of the lawmakers when the act in question was passed. It is not for the courts to suggest or entertain expedients by which the letter of the law may appear to be obeyed while its spirit and purpose are ignored.

Being of opinion that the three cars in question in each train, situated as they were, and being power-braked cars associated with the others of the same class, the law required their power brakes to be used and operated; that being rendered temporarily inoperative, it was the legal duty of the company to have had them repaired at Erie, Pa., a point where the company had repair men and materials available, suitable for that purpose; and that having ignored this legal duty, it has made itself amenable to the penalties imposed by the act. The view here expressed finds support in the opinion of the Circuit Court of Appeals for the Ninth Circuit, in the case of the *United States* v. *Great Northern Ry. Co.*, 229 Fed. 927; in the case of the *United States* v. *Carolina, Clinchfield and Ohio R. R. Co.*, in an opinion not yet reported, in the District Court for the Eastern District of Tennessee; in the very able dissenting opinion of Judge Knapp in the case of the *United States* v. *Chesapeake & Ohio R. R. Co.*, 247 Fed. 49; and in the various interpretations of the act by the Interstate Commerce Commission in their several reports.

In *United States* v. *Baltimore & Ohio*, 176 Fed. Rep. 114, District Judge Orr also held contrary to the position of the Government.

Concerning the opinions of both Judge Pritchard and Judge Orr, however, District Judge Sanford said:

> * * * the position in the train of the power- braked cars which were not connected up with the engine does not appear and they may well have been at the rear of the train and separated from the required number of power-braked cars directly connected with the engine. (*Ante*, 22, 23.)

On page 15 of the Company's brief appears the following:

> The Government claims that its construction under which defendant was found guilty will advance the purpose of the law, which, as expressed by the title, is to promote the safety of employees and travelers.
>
> That we deny. Such construction will require that a train fully equipped with power-braked cars, all brakes in perfect order when it leaves the terminal, be stopped and any car developing a brake defect set out either at the next siding or the next repair point. Air brakes require expert attention and can not be repaired by the crew as a hot box can. The car will have to be switched out of the train. * * *

The certificate shows (and Judge Thomson held) that at Erie the Company had repair men and materials available for the repair of the defective

brakes. If the brakes on the three cars were in working order when they left Coalburg there is no presumption that the needed repairs were of such a nature as to require that the cars "be switched out of the train." The stipulation will more readily bear the construction that the cars could have been easily repaired without switching out of the train or, indeed, without material delay. In any case, the Company did nothing. It took its chances when it pulled the train out of Erie with defective brakes on three cars. If three drawbars had been broken, that the repairs would have required that the cars be switched out would be obvious.

The trains in the instant case were composed exclusively of cars equipped with power brakes, the air-brake mechanism. All the cars were coupled together and the air was also coupled up and used on all except three cars in each train. Could there be a clearer case of association of power-brake cars? Each train was one hundred per cent equipped and all brakes used and operated by the engineer save those on the three cars. With a train composed exclusively of equipped cars it would be impossible to dissociate the power-braked cars. To dissociate power-braked cars there must be a nonair or a car that is not equipped with the power-brake mechanism placed between them, and then the air line or train line is not continuous and the interruption or break in the train line necessarily dissociates the particular cars. That is self-evident.

The last clause of the order of the Interstate Commerce Commission of June 6, 1910, requires that all power-braked cars in every train which are associated together with the minimum percentage of 85 to have their brakes used and operated by the engineer of the locomotive drawing the train. There could be no clearer application of a requirement of law to a state of facts than that in the instant case. There is no ambiguity in the words of the law, and if given their ordinary usage and meaning the logical conclusion is that the law has been violated by not having the brakes on the three cars in each train in question in use and operation by the engineer of the locomotive drawing the train.

## V.

### CONCLUSION.

The question certified by the Circuit Court of Appeals should be answered in the negative.

BLACKBURN ESTERLINE,
*Assistant to the Solicitor General.*
MONROE C. LIST,
*Counsel, Interstate Commerce Commission.*

DECEMBER 31, 1923.

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2. Under the amended Safety Appliance Act, which, as supplemented by the Commission's order, requires that 85 per cent. of the cars in any train shall be equipped with power brakes operated by the engineer and that all power-braked cars "associated together with" such minimum shall have their brakes so used and operated,—cars whose power brakes become disabled en route cannot lawfully be hauled to destination past an available repair station, even in a train of which 85 per cent. of the cars still have operable power brakes, if the former are so interspersed and associated with the latter that they form part of the air line by which the power brakes of the latter are operated. P. 45.

QUESTION certified by the Circuit Court of Appeals under § 239, Judicial Code, upon review of a judgment of the District Court in favor of the United States, in an action to recover penalties from the Railroad Company for violations of the Safety Appliance Act.

*Mr. S. H. West* for the New York Central Railroad Company.

*Mr. Blackburn Esterline,* Assistant to the Solicitor General, with whom *Mr. Monroe C. List* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought in the District Court for the Western District of Pennsylvania to recover penalties prescribed by the Safety Appliance Acts (Act of March 2, 1893, c. 196, 27 Stat. 531, as amended April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943). Judgment went in favor of the United States. The case was taken by defendant to the Circuit Court of Appeals on writ of error, and that court, under § 239 of the Judicial Code, certified a question of law to this Court. It is this: "May an interstate carrier lawfully operate a car equipped with power brakes past an available repair station to destination when its power brakes, becoming

out of order in transit, have been cut out of the power brake system of the train and when more than eighty-five per centum of the remaining[1] cars of the train are equipped with power brakes controlled by the engineer of the locomotive?"

On November 10, 1920, the train, which is mentioned in the first cause of action set forth in the complaint, was made up on defendant's railroad at Coalburg, Ohio. It consisted of 63 cars, all of which were equipped with air brakes; and it was moved over the defendant's lines via Erie, Pennsylvania, to Buffalo, New York. All the air brakes and air brake appliances were in working order when the train left Coalburg, and were operated by the engineer on the locomotive. Some time after leaving Coalburg, the air brakes on three cars became defective, so that they could not be used. Because of the liability of such brakes to stick and cause delay and damage to the train, the trainmen cut them out from their connection with the line of air hose by turning the cut-out cocks in the cross-over pipes. This made it impossible for the engineer to operate the brakes on these cars, but did not interfere with his use of the brakes on the 60 other cars. He did use and operate them independently of the defective brakes, and thereby controlled the speed of the train without requiring the brakemen to use the hand brakes for that purpose. The three cars with defective brakes were the tenth, fortieth and forty-fourth cars in the train, counting from the head end. At Erie defendant had repair men and materials available for the repair of the defective brakes. The train was run past the repair station to Buffalo in the condition stated above. The train mentioned in the second cause of action had 80 cars, and the facts with respect to it are in substance the same as the foregoing.

[1] The question is considered as if the word "remaining" were stricken out.

The pertinent provisions of the acts of Congress are: ". . . It shall be unlawful for any common carrier . . . to use . . . any locomotive . . . not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." § 1, c. 196, Act of March 2, 1893, 27 Stat. 531. ". . . Whenever . . . any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; . . ." § 2, c. 976, Act of March 2, 1903, 32 Stat. 943. ". . . All cars must be equipped with . . . efficient hand brakes; . . ." § 2, c. 160, Act of April 14, 1910, 36 Stat. 298. Penalties are prescribed by c. 87, Act of April 1, 1896, 29 Stat. 85, and § 4, c. 160, Act of April 14, 1910, 36 Stat. 298.

Pursuant to authority conferred upon it by the Act of 1903, the Interstate Commerce Commission, November 15, 1905, ordered that the minimum prescribed by the act be increased to 75 per cent; and, on June 6, 1910, ordered it increased to 85 per cent.

Defendant contends that, within the meaning of § 2 of the Act of March 2, 1903, the cars having air brakes which were out of order were not "power-braked cars" while in that condition, and that the law did not require their brakes to be operated by the engineer, as at all times power brakes on more than 85 per cent. of all the cars in the train were so operated.

The acts of Congress and orders of the Commission above referred to should be liberally construed to relieve

trainmen of the labor and danger involved in the use of hand brakes to control the speed of trains and to promote the safety of trains and of persons and property thereon. *Chicago, M. & St. P. Ry. Co.* v. *Voelker,* 129 Fed. 522, 527; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17. It is the purpose, as soon as practicable, to require all cars to be equipped with power brakes. See *In re Power or Train Brakes,* 11 I. C. C. 429. At the time in question, the requirements were that all cars be equipped with hand brakes; that at least 85 per cent. of all cars in any train be equipped with power brakes and operated by the engineer, and that all power-braked cars associated together with such minimum have their brakes so used and operated.

Only two classes of cars are contemplated by the act,—those equipped with hand brakes and power brakes, and those equipped with hand brakes only. When the train started from Coalburg, undeniably all were then "power-braked cars." The failure of the brakes to work did not take the cars out of that class.

Hand-braked cars lawfully may be hauled in trains having the prescribed number of cars equipped with power brakes operated by the engineer. The law does not require that the brakes on all power-braked cars in the train shall be so operated. See *Lyon* v. *Railway,* 77 S. Car. 328, 339; *United States* v. *Chesapeake & Ohio Ry. Co.,* 247 Fed. 49, 51; *United States v. Baltimore & Ohio R. R. Co.,* 176 Fed. 114, 119. It does not require the extra switching which would be necessary to associate together all power-braked cars in the train, and some of them may be separated from the prescribed minimum by hand-braked cars. See *In re Power or Train Brakes, supra.* Hand-braked cars have no air line, and it is necessary that they be placed in the train to the rear of the power-braked cars making up the prescribed minimum. The cars having power brakes which became defective and were cut out

formed a part of the air line and were located at intervals in the train. The air line through each of these cars was used to operate brakes on other cars after as well as before the cut-out cocks were turned. Clearly, they were associated together with the other cars equipped with power brakes. The act specifically requires that all power-braked cars so associated shall have their brakes used and operated by the engineer. Defendant's contention would permit the hauling, in association with cars having their power brakes operated by the engineer, of 15 per cent. of the cars in a train with power brakes in bad order and cut out. This would nullify the provision of § 2 of the Act of 1903. It must be held that the running of the train from Erie to Buffalo in the condition above described was a violation of the law. See *Pennsylvania Co.* v. *United States,* 241 Fed. 824, 830; *Virginian Ry. Co.* v. *United States,* 225 Fed. 748; *United States* v. *Great Northern Ry. Co.,* 229 Fed. 927.[2]

The unlawfulness of the operation resulted from the association in the air line of cars having defective brakes with cars having brakes operated by the engineer. The cutting out of the defective brakes, leaving the cars on the air line, did not terminate the association. While on the air line having their brakes cut out, such cars are to be distinguished from hand-braked cars. Because they have no power line, it is impossible, within the meaning of the act, to associate hand-braked cars with cars equipped with power brakes operated by the engineer. And, when not a part of the air line, power-braked cars whose brakes will not work are not so associated. When placed to the rear of the cars having their brakes operated by the engineer, the air line on such cars cannot be used to operate any brakes on the train. Having inoperative brakes and being so located, they are not associated with the prescribed

[2] Cf. *United States* v. *Chesapeake & Ohio Ry. Co.,* 247 Fed. 49; *United States* v. *Baltimore & Ohio R. R. Co.,* 176 Fed. 114.

minimum; and § 2 of the Act of 1903 does not require that they shall have their brakes operated by the engineer.

The question whether it was a violation of law to haul defective cars to Erie, the place of the first repair station, while associated in the train with the prescribed minimum is not involved in this case, and we express no opinion upon it.

The answer to the question certified is:

*No, unless placed in the train to the rear of all cars having their brakes operated by the engineer.*